Supreme Court of Appeals of Virginia.

CHARLES H. C. PRESTON *v.* D. D. HULL.

A bond executed by two persons, with a blank in the bond where the name of the obligee is to be inserted, and delivered, in this condition, to one of the persons by the other, with *parol* authority, to borrow money upon it and to insert the name of the person from whom the money is obtained, in the blank, as the obligee, is a mere nullity and is not the *deed* of the person so delivering it.

An agent cannot be empowered by *parol* to insert the name of the obligee in such an instrument.

The case of *Texira* v. *Evans* decided not to be law in Virginia.

ONE B. F. Mantz, being indebted to the appellant, Charles H. C. Preston, in about the sum of $600, informed the said Preston that he did not have the money to pay him, but said to him that he could borrow that amount in Marion for him if he, Preston, would execute his note for that sum. He expressed the belief that he could get the money from Gov. Fayette McMullin. Preston and Mantz then executed the following paper:

Marion, Oct. 10th 1868.

Sixty days after date we promise and bind ourselves, our heirs, &c., to pay $600 for value rec'd. of him as witness our hands and seals.

CHAS. H. C. PRESTON. [SEAL.]
B. F. MANTZ. [SEAL.]

This paper was then delivered to Mantz with instructions to borrow that amount from McMullin if he could, but if he could not get it from him, then he was instructed to borrow the money from any person who would loan the amount; and he was authorized, by parol, to insert the name of that person in the blank left in the paper above, as the obligee and to deliver it to him. Mantz failed to obtain the money from McMullin but did procure it from D. D. Hull, and thereupon inserted *his* name in the blank and delivered the instrument, thus filled up, to Hull.

Hull brought an action of debt upon this paper in the Circuit Court of Smyth county, Virginia. The suit abated as to Mantz, who had removed from the state. Preston appeared and pleaded payment and *non est factum*, with an affidavit, appended to the latter plea, setting forth the circumstances connected with the execution of the paper. Upon these pleas issue was joined. The above being the facts in proof, the cause was submitted to a jury.

On the motion of the plaintiff the court gave the following in-

struction: "If the jury shall believe from the evidence that the defendant executed the single bill in the declaration in this cause mentioned, and delivered the same to his co-obligor B. F. Mantz with a blank in said single bill, where the name of the obligee D. D. Hull, the plaintiff, is now inserted, with the understanding that the said B. F. Mantz was to procure money on the said single bill and to write the name of the person, from whom the money should be procured, in said blank as obligee and to deliver the said single bill to such obligee, and if the jury shall further believe from the evidence that the said B. F. Mantz procured the money from the said D. D. Hull, the obligee aforesaid in the said single bill, and wrote the name of the said D. D. Hull in the single bill and delivered the same to the said Hull, then the said single bill aforesaid is binding upon the said Preston, and the jury must find the issue for the plaintiff." The jury rendered a verdict for the plaintiff and the court entered up judgment accordingly. From that judgment this appeal was taken.

J. W. & J. P. Sheffey, for the appellants, cited 2 Rob. Practice 9 to 17; Shepherd's Touch. 68; *Hibblewhite* v. *McMorine*, 6 M. & W. 215; *United States* v. *Nelson*, 2 Brock. 64; *Asbury* v. *Calloway*, 1 Wash. 72; *Harrisson* v. *Tiernans*, 4 Rand. 177; *Rhea* v. *Gibson*, 10 Gratt. 215.

J. H. Gilmore, for the appellees, cited *Texira* v. *Evans*, as cited in *Master* v. *Miller*, 1 Anst. 228; *White* v. *Vermont & Mass. R. R. Company*, 21 How. 575; *Knapp* v. *Maltby*, 13 Wend. 589; *Bank of Buffalo* v. *Kortwright*, 22 Wend. 348; *Eagleton* v. *Gutteridge*, 11 M. & W. 465, and note; *Jones's Assignee* v. *Thomas*, 21 Gratt. 96; *Woolley* v. *Constant*, 4 Johns. 54; *Smith* v. *Cracher*, 5 Mass. 538.

STAPLES, J.—A bond is a deed whereby the obligor promises to pay a certain sum of money to another at a day appointed: 2 Black. 346. An obligor and obligee are essential to the existence and constitution of such an instrument. It is not indispensable that the party to whom the promise is made should be mentioned "*eo nomine*," that his name of baptism and surname shall be given, but he must be in some unmistakeable manner designated in the instrument. A writing, though executed with all the solemnities of a deed, without such obligee is a mere nullity. It imposes no liability upon the party issuing it. It confers no rights upon

him who receives or holds it. It is not simply an imperfect deed. It is no deed at all. It only becomes a deed when the name of an obligee is inserted, and delivery made by the obligor or by some one legally authorized by him. If the blank is filled by an agent, then the agent as certainly makes the deed as though the entire obligation had been written, signed, sealed and delivered by him. His act binds a principal not before bound. It creates a contract having no previous existence. It is true the act in question is merely the insertion of a name. Still its effect is to impart vitality to a piece of waste paper. It calls new rights and obligations into existence. It is followed by all the consequences resulting from the execution of the most solemn instrument.

The argument sometimes advanced, that there can be no danger or difficulty in conferring the power by parol when nothing remains to be done but the insertion of a name, to render the instrument complete, does not meet the real issue. The question is not one of trust and confidence reposed, but of power conferred. In the numerous and diversified transactions of mankind, agencies of the grævest character are often created by parol. A partner may bind his copartner to any amount for any matter within the scope of the partnership, by a note executed in the partnership name. The authority of an agent to sell land of his principal may be conferred without writing, and the latter may thus be bound irrevocably for his entire estate. In the execution and endorsement of negotiable paper, powers may be and are often conferred, by parol, upon agents involving liabilities to the amount of millions. The law recognises such agencies as essential to the commerce of the world. Why may not the agent in all these cases impose the same liabilities by deed in the name of his principal? If he may sell the land—fix the price and agree upon all the terms of the contract—why may he not perform the mere formal act of executing the conveyance? The answer is, the authority of the agent must be commensurate with the act he performs. The stream can never be higher than its source. If the act of the agent is the execution and delivery of a deed, his authority must be by deed. It does not matter how much of the instrument may have been written by the principal, if it is a mere nullity when it leaves his hands, and only becomes operative by act of the agent, upon every principle of sound legal reasoning the result must inevitably be the same. Whenever the agent undertakes to bind

his principal by an act, his authority, in point of dignity, must be co-equal with the act. The question is not, therefore, whether it is expedient that a mere parol agent shall have the power to fill the blank with the name of an obligee—but whether it can be done and sustained without violating well established principles of law. A little reflection will show that these principles are not without substantial reasons to support them. At common law a sealed instrument imposed peculiar liabilities. It was not affected by any Statute of Limitations. It operated as an estoppel. The obligor was not permitted to aver any want of consideration to avoid it; nor could he defeat an action at law thereon by showing any failure of title or breach of contract or mistake or fraud in the procurement of the bond. It is true that some of these obstacles have been removed by statute, and parties may now defend themselves in the common-law courts upon grounds purely equitable, but both in Virginia and in England, sealed instruments confer rights and impose obligations which can never grow out of the execution of any mere parol contracts. It is reasonable and just, therefore, that a party setting up a deed and seeking to enforce it shall be prepared to show, if necessary, that it is the act of the grantor himself, or of some one empowered by an instrument of equal dignity with the deed.

When the writing which is the subject of this controversy left the hands of Preston, it was not a deed. It certainly did not constitute a contract. It was indeed of no more value than the paper which contained it. When it passed into the possession of Hull, it had, in some way, become a deed and a binding contract according to the theory of counsel. How did it so become a deed? Certainly not by the act of Preston, as he was then absent and was not even informed of the transaction until some time afterwards. It was the act of the agent which gave efficacy to the paper and created an obligation by deed not before in existence.

At the time Preston signed the paper it was the expectation of both Mantz and Preston that the money could be obtained from Governor McMullin; but failing in that, it may be reasonably inferred, it was expected to borrow it elsewhere, and authority was given to Mantz, the agent, to fill the blank in the bond with the name of the person making the loan. Governor McMullin did not advance the money as was expected, and the arrangement was made with the plaintiff Hull, and his name inserted as obligee in

the bond. The agent did not simply fill the blank with a name previously agreed on by Preston, but he called into existence a new and unknown party, and bound his principal by a contract with him. In this respect the case is much stronger than that of the simple insertion of a name already declared by the obligor. A deed must exist before it can be delivered. That is clear. If an obligation, complete and perfect, be delivered by the obligor to a third person for the use of the obligee, it is the deed of the obligor immediately. The deed only becomes inoperative by the refusal of the obligee to receive it. In such case the delivery is the act of the principal or obligor and not of the third person or agent: *Skipwith's Executor* v. *Cunningham*, 8 Leigh 282.

Whenever, however, the principal commits to the agent an instrument that is not complete and operative at the time, with a blank for the obligee or the sum to be paid, to be filled by the agent and according to his discretion, the act of mind, the disposing power, which are always essential and efficient ingredients of the deed, are the agent's, and the instrument takes effect by his act of execution and delivery, and is binding upon the principal or not according to the authority conferred on the agent.

If Preston had endorsed his name upon a piece of blank paper with scrolls attached, and the agent had, afterwards, added the entire obligation under the previous verbal instructions of Preston, the agent in that case would have performed an act of no greater dignity than he has in this. The trust reposed may be greater in the one case than in the other. But the result is the same. In each case the principal becomes bound by an obligation created by act of the agent.

If the name of the obligee may be inserted, why may not the sum also, and if these may be supplied, why not the mere formal parts of the deed? If we once depart from the rule, how is the line to be drawn consistently with the preservation of any rule at all? If we say that the name or sum may be inserted by the agent, will it not lead us, inevitably, to the doctrine that the entire deed may be executed by the agent also? We shall be carried on, step by step, if we mean to be consistent, until we have destroyed all the well-settled distinctions between sealed and unsealed instruments.

It is asked what good purpose is to be subserved by these distinctions. It is sufficient to say that they exist—having their

origin in well established principles. In the language of Chief Justice MARSHALL they have taken such firm hold of the law they can only be removed by the power of legislation. We must bear in mind that one change in the law, often involves the necessity of others. Much mischief ensues—many embarrassments often occur in the administration of justice, from the disregard of some well-established rule of law, intimately identified by a long course of decisions, with others which, in their turn, are interwoven with the entire framework of society.

If deeds are to be placed in the particulars now contended for, upon the same footing with parol contracts, there are other distinctions between them that ought to be abolished. The same act of limitation should apply to a bond as to a promissory note. The defendant should be permitted to show a want of consideration in one case as in the other, and, above all, sound policy, it seems to me, requires that the whole technical doctrine of estoppel by deed should be greatly modified, if not entirely abolished. It has been suggested that the doctrine of estoppel *in pais* might apply to a transaction like this and the obligor estopped to deny the bond. It was said by Judge GIBSON, of the Supreme Court of Pennsylvania, in relation to a writing executed in blank and afterwards filled by a parol agent, if it could be sustained at all,—it would be upon the ground of estoppel *in pais*. But so far as I am informed he is the only judge who has suggested the idea. No reference is made to it by Baron PARKE, or Chief Justice MARSHALL, or Judge CABELL, or by the Supreme Court of the United States, or that of New York, in the cases before them. This proposition, carried to its legitimate results, will show that a mere parol agent may *always* bind the principal by a deed. If the obligor, who trusts his agent with a writing with blanks as to the names or sums, is estopped to deny that it is his bond—when the blanks are afterwards filled by the agent—so must also the obligor who trusts his agent merely with his name and a scroll attached—when the entire obligation is afterwards added. In truth the doctrine of estoppel has no application to the case. The party advancing his money is put on his guard by the face of the paper. He sees that it is not a deed, and he is bound, at his peril, to inquire into the authority of the agent to make it a deed. He is presumed to know the law. He must know that the agent's authority must be by deed. If he is misled, it is by his own folly

and the act of the agent. It cannot be justly said that he has been deceived by the party whose signature is attached to the writing.

Having thus considered the principles affecting the case, let us see how stand the authorities bearing upon the question.

In England one of the earliest cases is that of *Texira* v. *Evans*, decided by Lord MANSFIELD. We have no contemporaneous report of the case. All our information is derived from the statement of an English judge, made long after *Texira* v. *Evans* was decided. However, the case was questioned at an early day by the most eminent judges and lawyers—and has been, long since, entirely overruled in the English courts. I will not attempt to comment upon or even cite the various cases. A brief reference to that of *Hibblewhite* v. *McMorine*, 6 M. & W. 200, will be sufficient. This case was decided by the Court of Exchequer in 1840, the opinion being delivered by Baron PARKE, than whom no more eminent common-law judge ever adorned the English bench; one question arising in the case was whether the writing was a deed or mere note—it was held to be a deed. He then said: "Assuming the instrument to be a deed, it was wholly improper if the name of the vendee was left out; and to allow it to be afterwards filled up by an agent appointed by parol, and then delivered in the absence of the principal as a deed, would be a violation of the principle that an attorney to execute and deliver a deed for another must himself be appointed by deed." He further declares, "The only case cited in favor of the validity of such a deed, is *Texira* v. *Evans*, which is not sustained by the authorities and which cannot be considered to be law." After reviewing the various cases, and showing they are not in conflict with his views, he proceeds, "It is enough to say there is none that shows that an instrument which when executed is incapable of having any operation and is no deed, can afterwards become a deed by being completed and delivered by a stranger in the absence of the party who executed it, and unauthorized by instrument under seal."

It has been suggested that this authority has been much weakened if not overthrown by the case of *Eagleton* v. *Gutteridge*, 11 M. & W. 465. This is an entire mistake. The only point there decided was, that a complete and operative power of attorney was not invalidated by the insertion of the attorney's Christian name in the absence of the principal. The instrument was good

without the addition and was not affected by it. The opinion of Baron PARKE in *Hibblewhite* v. *McMorine*, was sustained by the unanimous decision in *Enthoven* v. *Hoyle*, 13 C. B. 373, one of the latest cases, and is now the settled law of England: 2 Starkie 431; Buller's Nisi Prius 281.

In the United States the authorities are conflicting. The volumes containing the various cases are not to be found in this place. Many of the decisions are cited and distinguished in Rob. Prac., vol. 2 (new edition) 86, to which I refer. It seems that in New York and South Carolina the courts have followed the doctrines of Lord MANSFIELD, in *Texira* v. *Evans*. In Pennsylvania formerly the same rule was adopted, but in *Wallace* v. *Harmsted*, 3 Harris 462–8, Chief Justice GIBSON, speaking for the court, expressed very grave doubts of the correctness of *Texira* v. *Evans*, and said that case could only be sustained, if at all, on the ground the obligor had estopped himself by an act *in pais*.

In Massachusetts I am unable to say what the rule is. The case of *Smith* v. *Cracher*, 5 Mass. 538, relied upon by counsel for defendant in error, does not decide, if it even raises the question involved in this controversy. There the instrument was a complete obligation when signed by the obligor, and the alteration subsequently made was wholly immaterial. Judge PARSONS, however, in delivering his opinion, went far beyond the case before him. He declared, and this is now relied on, "That the party executing a bond, knowing there are blanks in it to be filled up by inserting particular names or things, must be considered as assenting that the blanks may be thus filled up after he has executed the bond." Chief Justice MARSHALL, in *United States* v. *Nelson*, hereafter to be considered, plainly shows that Judge PARSONS had reference to an *operative* instrument when executed, but having blanks to be filled with names or things already agreed on by the parties, and not to an instrument with a blank such as deprived it of all obligatory force when signed. A blank of such vital importance that a paper, while it so remained, was a mere nullity, does not seem to have been in the view of Judge PARSONS.

I have thus named the states which are supposed to follow *Texira* v. *Evans*. There may be others. It is impossible to say in the absence of the reports of the various states of the Union. On the other hand, the Supreme Court of North Carolina, when the bench

was adorned by the genius and learning of a GASTON and a RUFFIN, has not hesitated to follow the later English cases, overruling the decision of Lord MANSFIELD. In *Davenport* v. *Sleight*, 2 Dev. & Bat. 381, an instrument signed and sealed by the defendant in blank and delivered to an agent with directions to purchase a vessel for the defendant and fill up the instrument with the price to be agreed on and deliver, it was held not a good bond even though the defendant declared his approbation of what had been done. The court considered the insertion of the sum in the blank space intended to consummate the deed as done without legal authority, and therefore that the instrument is void as a bond. And with this ruling it is believed agree the cases in Kentucky, Maryland, Texas and Tennessee.

The same principle is laid down in Parsons on Contracts, vol. 2, 723, in the following terms, and is there supported by a strong array of cases: "If there are blanks left in a deed affecting its meaning and operation in a material way and they are filled up after execution, there should be a re-execution and a new acknowledgment."

In the case of the *United States* v. *Nelson*, 2 Brock. 64, Chief Justice MARSHALL did not hesitate to express his entire concurrence with the later English decisions. In that case the printed form of an official bond had been signed by the securities with blanks for the date and penalty. It was afterwards signed by the principal, and the blanks filled in the absence of the securities, without their knowledge and without any authority from them other than might be implied from their having executed the paper with intention to bind themselves as sureties and with full knowledge of the object of the bond. The Chief Justice held that the instrument was not binding upon the sureties. In the course of his opinion, he said no sum being mentioned in the bond the defendants were no more bound by the instrument they had executed, *at the time of its execution*, than if the paper had been all blank. He maintained there are certain differences between sealed and unsealed instruments which made it difficult to apply the principles of one contract to the other, that these differences and the rules founded on them, though originating in a different state of society, have taken such fast hold of the law that they can be separated only by the power of legislation.

Throughout the opinion he kept carefully in view the distinction

between an instrument which is a mere nullity and imposes no obligation whatever when it is signed and delivered, and an instrument which is complete when executed, and the alteration is merely in the words or in filling blanks with names or things agreed on and by consent of the parties. And he showed that the cases relied on as sustaining the validity of blank bonds afterwards filled up were all of this latter character. He admitted that the Supreme Court of the United States in *Speake* v. *United States*, 9 Cranch 28, had gone very far in deciding that an obligation may be originally created by virtue of an authority merely implied from the sealing and delivery of a paper which in its existing state could avail nothing, and he thought it probable the time would come when that court might completely abolish in this particular the distinction between sealed and unsealed instruments. But no one reading the opinion carefully can fail to perceive that the learned Chief Justice did not incline to this view, and that he intended to adhere to the doctrines of the common law as expounded in England. It is to be observed that the case of *Hibblewhite* v. *McMorine* was decided many years afterwards, so that the Chief Justice arrived at his conclusions without the aid of the able and exhaustive opinion of Baron PARKE.

The case of *White* v. *Ver. & Mass. R. R. Co.*, 21 How. 575, has been also much relied on as authority for the defendant in error. It was there held that the bonds of a railroad company, payable in blank, might be filled up by any *bonâ fide* holder and made payable to his own order. But the reason assigned by the court is, that the usage and practice of railroad companies, of capitalists and business men of the country, and the decisions of the courts, had impressed upon this class of securities the character of negotiability. Being negotiable they were of course governed by the laws applicable to such instruments, one of which is they may be executed, endorsed or altered under a mere parol authority. In the course of his opinion, Mr. Justice NELSON alluded to the case of *Texira* v. *Evans*. He admitted it was not the law in England. He said however, that courts of the highest authority in this country have followed Lord MANSFIELD, and have not hesitated to meet the fears expressed by Baron PARKE, that the effect would be to make bonds negotiable, by admitting the consequence. But the Supreme Court of the United States have not yet gone that far, and Mr. Justice NELSON admits that Chief Justice MARSHALL

was unwilling to do so. It is conceded on all sides that to follow the rule declared in *Texira* v. *Evans*, is to destroy all distinction between deeds and mere parol contracts. Are we prepared for that in Virginia? No one, familiar with the opinion of the judges and the decisions of our courts, can hesitate to affirm that the disposition here, is to follow the common-law doctrines and preserve unimpaired the distinction between sealed and unsealed instruments.

In *Harrisson* v. *Tiernans*, 4 Rand. 177, the question was as to the validity of certain instruments taken by the sheriff as bail-bonds. They were in the usual form, signed and sealed by the obligors, but without any sum being mentioned in the penalty of the bonds. Counsel in arguing, endeavored to apply the principles governing bills of exchange and promissory notes, according to which a man who signs his name to a blank piece of paper will, under certain circumstances, be considered as giving authority to fill it up with a valid instrument. But this court said, Judge CABELL delivering the opinion, that bills of exchange and promissory notes *are not deeds*, and authority to execute them may be given by parol, or even inferred from circumstances, but a bail-bond is a deed which cannot take effect without delivery, and that delivery can only be made by the party himself or by some attorney legally authorized by deed for that purpose. What are we to understand by this language? that the blanks in the bonds might have been filled by a mere parol agent? Clearly not. Judge CABELL means that this could only be done and the instruments delivered by the parties themselves or by attorneys authorized by deed. If he does not mean this, his language does not admit of any fair and reasonable interpretation. He declares that the bonds are wholly inoperative by reason of the failure to insert a penalty. I beg to know what substantial difference there is between an instrument confessedly a mere nullity for the want of a sum to be paid; and an instrument which is a mere nullity for the want of an obligee to whom to be paid. The authority to execute and deliver or complete and deliver such an instrument must of necessity be the same in both cases. In *Cleaton* v. *Chamblis*, 6 Rand. 92, this question arose incidentally. According to my understanding, the proposition there announced, is that any material alteration of a deed invalidates it, unless made under such circumstances of consent by the obligor as amount to a re-execution or re-acknow-

ledgement of the writing. The reason is obvious, the alteration changes the contract. The writing is no longer the deed of the obligor or grantor. In its altered state it must be re-executed by him, and then it takes effect from the re-execution. Now whether it be the re-execution of an altered deed, or the execution of a new one or the completion of an imperfect one, there can be no well-defined distinction, and the same principles must govern in each case in respect to the act necessary to a valid instrument.

I am aware that in *Rhea* v. *Gibson*, 10 Gratt. 215, 220, Judge SAMUELS admitted there was some conflict of authority upon this point. He however cited a number of cases as deciding that the filling of blanks in a bond will not give it validity unless under circumstances which make a new execution thereof. And among the cases thus cited are those I have just mentioned. Why they are not authority for us I am at a loss to understand, but conceding they are not, they clearly show the leaning of the Virginia courts and judges, and they indicate a purpose to adhere to the common-law doctrines until changed by legislation. The cases of *Clegg* v. *Lemessurier*, 15 Gratt. 108, and *Stinchcomb* v. *Marsh*, Id. 211, though not involving the point in controversy here, exhibit the same tendency of our courts in this class of questions. In one of these cases the counsel having cited the decisions of eleven states of the Union to show that the affixing of a scroll to the name, is of itself sufficient evidence of its being intended as a seal—the court said, however desirable conformity with the different states might be, it furnished no sufficient reason for reversing our course of decisions. In the other case the question turned upon the operation and effect of a power of attorney and of acts done by a sub-agent thereunder. Counsel in urging upon the court to give a liberal construction to the instrument, had suggested that a spirit of self reliance and directness of purpose will prompt the people of this age and country to disregard the formalities of conveyancing and the rules of law by which they are prescribed. Judge LEE said this constituted no sufficient reason, nor furnished any adequate authority to change the law or overthrow plain, intelligible and well-settled principles. That is the province of the legislature not of the judiciary. I think these cases strongly illustrate the reluctance of this court to reverse *its* course of decisions because other states may have adopted a different rule or because of casual instances of hardship occurring in individual cases.

In the present case it seems to me to be the safest course to adhere to our previous rulings, and to the doctrines of the common law as expounded by the courts of that country from which we have derived our laws, our language and our system of jurisprudence. It is true that in many cases the principles of the common law as sanctioned and enforced by the English courts are ill-suited to the temper of our people and the genius of our institutions, but as a general rule that state which most rigidly adheres to the course of English decisions and precedents, will in the end attain the most stable and the most conservative administration of justice.

For these reasons I am of opinion the judgment of the Circuit Court should be reversed, the verdict set aside and a new trial had in accordance with the principles herein announced.

MONCURE, P., and ANDERSON, J., concurred.

CHRISTIAN and BOULDIN, JJ., stated that they, very reluctantly, yielded their assent, in order that this question might be a settled one in Virginia, but they both declared that if they could control the decision upon this point, they would unhesitatingly follow Lord MANSFIELD in *Texira* v. *Evans*, and they both stated that in their opinion, Preston was both legally and morally bound to pay this money.

The common-law rule that an agent to fill in an essential part of an executed deed must be constituted under seal, is now in full force in England. The attempt made by Lord MANSFIELD in *Texira* v. *Evans* to relax its strictness in favor of a *bonâ fide* obligee was finally unsuccessful. After serving as a precedent for sixty years, it was overruled by Baron PARKE in *Hibblewhite* v. *McMorine*, 6 M. & W. 216, and is no part of modern English law. In *Eagleton* v. *Gutteridge*, 11 M. & W. 466, a blank in the Christian name of an attorney in a power was filled up by him after execution by the principal; but the addition, being held immaterial, did not vitiate the power. *Davidson* v. *Cooper*, 11 M. & W. 793, which was decided at the same term, declares *Texira* v. *Evans* overruled. In *Squire* v. *Whitton*, 1 House of Lords Cases 333, a bond executed with the obligee's name in blank, and filled in by implied authority, was held void both at law and in equity; and finally, in a case of great hardship, *Swan* v. *The North British Australasian Co.*, 8 Jurist N. S. 940 (1862), an instrument under seal executed by the plaintiff with blanks afterwards filled in by a parol agent, in fraud of third parties, was held void by all the judges, though the plaintiff had been guilty of such culpable negligence that Baron PARKE was inclined to hold him estopped from denying that the instrument was his. The English law may therefore be considered as settled.

The American decisions are hopelessly conflicting. A majority of the states incline to the common-law rule, but a large minority reject it; some altogether, some to a qualified extent, as the cases before them demanded. Hesitating be-

tween the mischiefs that might ensue from too bold an innovation upon the common law, and the evident injustice of allowing obligors to escape from the consequences of their acts, the courts, in those states which reject the strict doctrine, have departed from it only so far as was necessary in the premises. Distinctions have been taken between a bond and a conveyance; between a piece of blank paper signed and sealed, and a bond or deed in which some essential part was wanting: between express authority and implied authority; between authority to fill in a given name or a fixed sum, and authority to insert the name of whomsoever, for an amount to be determined by the agent. Nor have the decisions in individual states been consistent. The fluctuations of judicial opinion, as evinced in the number of cases doubted and overruled, are very noticeable. In this chaos of conflicting authorities, it has been thought best to present the law of the different states *seriatim*, stating, as far as is necessary, the circumstances of each case, and the distinctions laid down by the court.

Arkansas, Illinois, Georgia, Kentucky, Massachusetts, Mississippi, North Carolina and Tennessee, to which, we may now add Virginia—follow the strict rule. In some cases there has been an inclination to relax it, but the latest decisions affirm it in its full vigor.

In Arkansas, the leading case is *Cross* v. *The State Bank*, 5 Pike 525. In that case a bond was executed with a blank for the sum, and filled in without express authority. The court say broadly that the writing was no deed, and could not be made such except by an agent under seal. The American cases are reviewed, and the decision is in favor of the common-law rule.

In Illinois, in *Maus* v. *Worthing*, 3 Scammon 26, written authority was given to sign a surety's name to an appeal bond; but, say the court, "the rule of law seems well settled that an agent or attorney cannot bind his principal by deed, unless he has authority by deed so to do." BREESE, J., dissenting, said, "The rule as laid down appears to me destitute of any good reason, and altogether too technical for this age." In *Bragg* v. *Fessenden*, 11 Ill. 544, an agent, according to a request in writing, executed an appeal bond for his principal, and a regular power of attorney ratifying his action was afterwards filed under seal. *Held*, that the original bond was void, and *quære* whether the ratification would relate back. See also *People* v. *Organ*, 27 Ill. 27.

In Georgia, in *Ingram* v. *Little*, 11 Geo. 174, a deed executed with blanks was filled in by an agent appointed in writing, and was held void. "We put our decision," says NISBET, J. "upon authority, conceding that the books in England and in this country are in distressing conflict, and with some misgiving whether reason and common sense do not condemn it."

In Kentucky, the point was directly decided in *Cummins* v. *Cassily*, 5 B. Monroe 75. "Can an agent without authority under seal bind his principal by a sealed instrument? The unbroken current of decisions is to the contrary." See also, *Southard* v. *Steele*, 3 Monroe 435; *McMurtry* v. *Frank*, 4 Monroe 41; *Trimble* v. *Coons*, 1 B. Monroe 199.

In Massachusetts, in *Smith* v. *Crooker*, 5 Mass. 538, followed in *Hunt* v. *Adams*, 6 Mass. 519, the name of a surety, after he had executed a bond, was filled into the body of the bond by a parol agent. The decision turned entirely upon the immateriality of the addition. In *Burns* v. *Lynde*, 6 Allen 305 (1863), it was decided that "filling up a blank form of a deed by parol authority of one who has signed and sealed it, will not make it a valid conveyance, unless the instrument is redelivered." The Massachusetts cases are reviewed, and shown to be consistent with the common law.

In Mississippi, a bond sealed with

blanks which were afterwards filled in by a parol agent, is void: *Williams* v. *Crutcher*, 5 Howard 71. In *Dickson* v. *Hamer*, Freeman's Ch. 284, the Chancellor declared himself constrained by the authority of *Williams* v. *Crutcher*; but intimated that in his view, the distinction lay between express and implied authority.

In North Carolina, *Vanhook* v. *Barnet*, 4 Dev. Law 272, was decided upon the immateriality of the addition. The law was settled by *Graham* v. *Holt*, 3 Iredell's Law 300, in which a sum left blank in a bond was afterwards filled in by an agent not under seal. The bond was held void, and *Texira* v. *Evans* disapproved of. To the same effect are *McKee* v. *Hicks*, 2 Dev. 379; *Davenport* v. *Sleight*, 2 Dev. & Bat. 381.

In Tennessee, a blank paper signed and sealed, with verbal authority to fill in as a bond, was held void after the blanks had been filled. The judges assert the common-law rule. See also *Smith* v. *Dickinson*, 6 Humph. 261; *Turbeville* v. *Ryan*, 1 Humph. 113, and *Mosby* v. *State of Arkansas*, 4 Sneed 324.

The Virginia decisions are sufficiently considered in the principal case. The strict rule laid down by the majority of the court will no doubt settle the law.

Next in order come the states that incline towards the English doctrine, without positively laying it down.

In California, a deed in due form, signed, sealed and acknowledged by the grantor, with the grantee's name afterwards inserted by a parol agent, is void: *Upton* v. *Archer*, 41 Cal. 85 (1871). The decision was under the Statute of Frauds, which requires an agent for such a purpose to be appointed in writing; but the counsel relied upon the common-law doctrine, and the reasoning of the court goes far to establish it.

In Ohio, a blank paper was signed and sealed, and a money bond written over it by an agent verbally appointed: *Ayres* v. *Harness*, 1 Ohio 368. The counsel cited cases like the principal one; the court said, "an authority to fill one particular blank falls far short of an authority to make an entire deed."

In Maryland, in a case identical with *Ayres* v. *Harness*, the court held the bond void, but decided that a subsequent acknowledgment by the grantor of his hand and seal was a redelivery: *Byers* v. *McClanahan*, 6 G. & J. 250.

In Delaware, the distinction is taken between *implied* and *expressed* authority, and it was held in *Clendaniel* v. *Hastings*, 5 Harr. 408, that an authority merely implied to fill in the blanks in an executed bond, did not bind the obligor.

In Pennsylvania, the earlier decisions support *Texira* v. *Evans*. See *Sigfried* v. *Levan*, 6 S. & R. 308; *Stahl* v. *Berger*, 10 S. & R. 170. In *Wiley* v. *Moor*, 17 S. & R. 438, the obligors signed and sealed a piece of blank paper, and left it with the judge to be filled in as a bond. It was held binding, and *Texira* v. *Evans* declared to be law. See also *Graham* v. *Ogle*, 2 Penna. 132. But in a later case, *Wallace* v. *Harmstad*, 3 Harris 468, and 2 Barr 194, it was held, in effect, that no authority to fill in a deed could be *implied*. "There is no instance," says GIBSON, C.J., "of an implied agency to alter a deed." *Texira* v. *Evans* "can be supported, if at all, only upon the ground of an estoppel by an act *in pais*." It seems probable that express authority, especially if in writing, would be held sufficient in Pennsylvania.

In New York, the decisions are conflicting. In *Ex parte Kirwen*, 8 Cow. 118, a blank for the sum left in an appeal bond was filled in after execution by an agent verbally appointed, and held valid. But in *Hanford* v. *McNair*, 9 Wend. 54, a very strong case, the agent was authorized in writing to enter into a contract for the purchase of lands, made the contract under seal, and though rati-

fied by the principal, it was held void. The only exception to the strict rule "is when the agent affixes the seal of the principal in his presence and by his direction." See also *Blood* v. *Goodrich*, 9 Wend. 68, 12 Wend. 525. In *Bank of Buffalo* v. *Kortright*, 22 Wend. 348, the Court of Errors declared *Texira* v. *Evans* law in New York; but this statement was unnecessary to decide the case in point, that of a blank transfer of a stock certificate, not required to be under seal. Accordingly, in *Worrell* v. *Munn*, 1 Seld. 239, it was held that if the instrument executed by the agent derives its validity merely from the seal, it is void; but if good without seal, it will be binding as a parol contract. The last case is *Chauncy* v. *Arnold*, 24 N. Y. 330 (1864), where the blanks never having been filled in, the deed was held void; but see the opinion of the court. The point must be considered still in doubt in New York.

The Federal courts now lean towards *Texira* v. *Evans*. *Speake* v. *United States*, 9 Cranch 28, settled that an express parol authority to alter a sealed instrument could be shown; but C. J. MARSHALL, in *United States* v. *Nelson*, 2 Brock. 64, decides, "with much doubt," that no implied authority will be sufficient. In *Drury* v. *Foster*, 2 Wall. 24 (1864), although the decision turned upon a personal incapacity, the court intimated that, otherwise, a deed filled in by a parol agent would be valid. "Although it was at one time doubted whether parol authority was adequate to authorize an alteration or addition to a sealed instrument, the better opinion at this day is that the power is sufficient."

In Iowa, there is a strong *dictum* by DILLON, J., in *Simms* v. *Hervey*, 19 Iowa 273, against *Texira* v. *Evans*. But in *Devin* v. *Himer*, 29 Iowa 298, an express authority to insert a grantee's name, followed by ratification, was held binding; and in *Owen* v. *Perry*, 25 Iowa 412 (1868), it was decided that a written authority would be sufficient, though the deed was to be filled up to whomsoever.

In Connecticut, the point does not seem to be directly ruled, but the inclination of the court is towards *Texira* v. *Evans*. In *Bridgeport Bank* v. *N. Y. & N. H. R. R.*, 30 Conn. 231, a blank power of attorney under seal accompanying stock certificates, was filled up. The court decided it valid under New York law; but ELLSWORTH, J., intimated that the Connecticut law would be the same.

In New Jersey, *Camden Bank* v. *Hall*, 2 Green 383, does not seem decisive, as the circumstances of the case might well have amounted to a redelivery.

In Maine, parol authority to fill in any instrument under seal is sufficient. See the cases reviewed by the court in *Inhabitants of South Berwick* v. *Huntress*, 53 Maine, 89.

In Alabama, *Boardman* v. *Gore*, 1 Stew. 517, is a case of implied authority to fill in the obligee's name; but as the bond was payable to "—— *or Bearer*," the insertion was hardly material. In *Gibbs* v. *Frost*, 4 Ala. N. S. 720, an express parol authority was held sufficient. *Texira* v. *Evans* is quoted as authority.

In Texas and Indiana, the statutes abolishing seal, and in Louisiana the peculiar system of the state, would probably be fatal to the common-law rule. In the latter state, appeal bonds filled in after execution by the sureties have always been held binding: *Breedlove* v. *Johnson*, 2 Martin N. S. 517; *The State* v. *The Judges*, 19 La. 179, even in a case of extreme hardship: *Charlaron* v. *McFarlane*, 9 La. 230.

Finally, in South Carolina, the courts explicitly sustain *Texira* v. *Evans*. All the cases appear to be those of express authority; but the reasoning of the judges goes the full length: *Bank of S. C.* v. *Hammond*, 1 Rich. 281; *Gourdin* v. *Commander*, 6 Rich. 497; *Duncan* v. *Hodges*, 4 McC. 239. But it was inti-

mated in the last case that a blank piece of paper signed and sealed is utterly nugatory.

It is proper to add that all the cases agree that if the instrument under seal be filled up *in the presence* of the grantor and with his consent, it will be binding upon him. The agent is then considered merely his hand in filling in the blanks.

If in the conflict of authorities, the expression of an individual opinion be permitted,—the common law rule seems to us too technical to be suited to our modern society. The only substantial reasons in its favor are founded upon the danger of perjury and the uncertainty of parol testimony. These disadvantages would not exist in the case of implied authority, and could be readily obviated by requiring express authority to be in writing. When so many incidents to the seal have been abolished, no valid reason is perceived for retaining one so apt to screen fraud and injustice.

R. S. H.

Supreme Court of Errors of Connecticut.

ATWOOD, TRUSTEE, *v.* HOLCOMB.

A father, acting in good faith, may make a valid gift to his minor son of his time and future earnings, although insolvent at the time.

TROVER; brought to the Court of Common Pleas of Hartford county, and tried on the general issue, with notice, closed to the court. Judgment for the plaintiff and motion for a new trial by the defendants.

On March 23d 1867, the plaintiff was indebted to the defendant Holcomb and was insolvent. He had a son Arthur, seventeen years of age, and on that day gave him a letter of emancipation, by which he agreed that his services and future earnings, which then belonged to the plaintiff, should belong thereafter to the son. There was no consideration whatever for this gift. In September of that year Arthur negotiated for the purchase of a colt with one Hays, who completed the sale with the plaintiff's wife, and conveyed the title to her in the same month. She paid therefor $5 of her own, and Arthur thereafter caused $22.50 of his wages, earned after the date of the letter of emancipation, to be paid as part payment for the colt. This colt was afterwards exchanged for a horse. The defendants caused this horse to be attached in a suit against the plaintiff, and the plaintiff brought trover as trustee for his wife.

Perkins (with whom was *W. C. Case*), in support of the motion.—It is well settled that the policy of our law favors an appropriation of *all* available means of the debtor, of every kind, for